Cannabis Will Happen: Is Your Workplace Ready?

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In this article, Glenn Mott speaks with Crystal Stevens McElrath, a senior attorney at Swift Currie McGhee & Hiers, LLP. Ms. McElrath represents and counsels employers and insurers in workers' compensation and employment law matters. In this role, she has found her vocational calling in providing for-profit and nonprofit employers with the legal counsel they need to carry out their missions. While in law school, Ms. McElrath clerked for the Honorable Stanley Birch, Jr., on the Eleventh Circuit Court of Appeals, as well as the Honorable William Duffey on the District Court for the Northern District of Georgia. In addition to her Master's in Theological Studies and a Juris Doctor, both from Emory University, she holds a Certificate in Nonprofit Management from Duke University.

If you've been worried about "weed" in the workplace, you're not alone. A patchwork of statutes permitting medical and recreational marijuana use are in place around the country, despite federal law that bans the cultivation, sale and use of cannabis. Marijuana possession and use may be a violation of federal law, but if you're assuming that no one on your staff would ever show up for duty under the influence of cannabis, you're going to face some hard realities without a plan. Attorney Crystal McElrath will host a session during NRMC's Risk Summit on October 21, 2019. Her session will explore the impact of marijuana use on nonprofit workplaces and offer tips and strategies to navigate through the haze.

We sat down with McElrath to ask what nonprofit employers need to know about the legalization of marijuana, including the interaction between state and federal laws, and important considerations when dealing with recreational versus medical marijuana usage.

NRMC: To date, thirty-five US States have legalized marijuana for recreational or medical use. Yet, at the federal level, marijuana is still classified as a Schedule I substance per the Controlled Substances Act, where Schedule I substances are considered to have a high potential for abuse with "no accepted medical use," making distribution of marijuana a federal offense. Legalization of medical and recreational marijuana combined with confusion about overlapping state and federal laws has created a host of challenges for nonprofit employers.

CM: My take is that for most employers, nonprofits included, it's become a more frightening issue that it needs to be. That's not to dismiss anyone's concerns. There is a lot of confusion out there.

NRMC: Nonprofit leaders are adjusting their policies to comply with new laws while also considering how they will respond when marijuana concerns arise in the workplace.

Can you give us an overview of the challenges for nonprofit employers?

CM: One place to begin is by asking: Do employers still have the right to act on cannabis, just as with alcohol, if there is reasonable suspicion of impairment on the job? Reasonable suspicion drug tests are going to be ok, but there is a new trend toward prohibiting random or pre-employment testing that seeks out opportunities to discriminate against people who legally use marijuana.

Anti-discrimination laws pertaining to marijuana and the workplace create a fine line between prohibited and

permitted, and employers need to be aware of the consequences of crossing the line. We may say you are not allowed to use cannabis for safety reasons, but under the protection of many state and local ordinances, we can't discriminate against those who consume cannabis legally and responsibly, either for medical reasons or recreationally on their own time.

NRMC: Not long ago, random drug testing was seen as the most equitable way to screen employees. You're saying that's now flipped so that random testing is viewed as confirmation bias against a protected class of people under local laws?

CM: I'd like to add some nuance there and suggest that employers consider a shift toward "reasonable suspicion drug testing" rather than random drug testing. It's a minor shift, but an important one. Pre-hire and random drug tests would have been a safe category even as few as 3 or 4 years ago. But if we look at recent legislation, you may have issues randomly drug testing people, depending on where you live. What is the reason for an employer to identify people who use marijuana recreationally? Alleged bias, disproportionately impacting a protected class—that's the political narrative now. Now the people you are targeting are cannabis users who may be consuming legally in accordance with state and local laws. And while it's still a Federal issue, anti-discrimination laws are protecting them. So, states like Connecticut and Vermont have prohibited random testing, and similarly, New York City and the State of Nevada will have a problem with testing at the time of hire. In Georgia, maybe not.

NRMC: Case in point, under a bill approved in April by the New York City Council (awaiting Mayor Bill de Blasio's signature), employers will no longer be able to force job applicants to take drug tests for marijuana use. Do you see more state and local governments following this strategy with similar legislation?

CM: Yes, Nevada just became the first state to ban pre-employment marijuana testing. Every time I discuss this topic, I have to update the content to reflect new laws being passed every single month.

The Controlled Substance Act (CSA) prohibits the sale, purchase, or use of marijuana for *illegal* purposes. Since the CSA aims to prevent marijuana from being used for illegal purposes, states have said, what if we make certain uses legal? In this way, states have successfully defined the *legal* uses for marijuana.

This can be especially difficult to sort out if you're a national or multi-state employer. And in states where marijuana is completely banned, employers must anticipate situations involving staff or volunteers who consume marijuana.

NRMC: What factors should a nonprofit employer be aware of, if they have offices in multiple municipalities?

CM: Local mayors and municipalities are pushing more liberal (wide-ranging) anti-discrimination policies, making it more difficult for employers. Is it advisable to test for marijuana in the workplace when there are local laws that view testing as discriminatory?

In Massachusetts, a court ruled that permitting offsite marijuana use as an exception to the company's drug policy should be considered as a reasonable accommodation if an employee's physician prescribed medical marijuana. Meanwhile, courts in Washington State have held just the opposite. Some states have indicated that a medical marijuana card is proof that a person has a qualifying disability under the Americans with Disabilities Act (ADA). Other states have said there is no disability if the medical issues can be addressed by medical marijuana. Simply put, states are still all over the place on this issue and the federal government is not a tiebreaker.

NRMC: What are your baseline best practices for nonprofit employers?

CM: Here are my recommendations:

- *Don't ask*. Don't administer drug tests unnecessarily and don't seek out opportunities to discriminate.
- *Identify safety sensitive positions*. Carve out warehouse forklift, construction jobs, or any roles with the potential for serious bodily injury or death. By the way, I would include tramadol for back pain, and opioids as being prohibited in these safety-sensitive positions.
- *Revise your policy regarding marijuana use and drug testing—being clear about state and federal laws*. What happens when you write a handbook for two or more states? Make certain your employees know

the local laws.
- *Document signs of impairment*. These are legitimate business and liability concerns that provide a non-discriminatory reason for drug testing.
- *Enforce policy consistently*. Establish a policy for non-discriminatory testing.

NRMC: In your view, is the issue getting more difficult for employers?

CM: It's just getting more confusing. We're seeing groups seeking more legislation at the implementation level, and that means increased litigation could follow.

A lot of employers look to OSHA for guidance on drug testing but in the last 3 years, even that has become more of a headache for employers. In an October 11, 2016 memo, OSHA encouraged employers to administer post-accident drug testing only where intoxication could have caused the injury—e.g., not after a report of carpal tunnel syndrome or a bee sting. The Department of Labor was concerned that post-drug-testing in these scenarios might be used to deter accident reporting and allow employers to retaliate against injured workers. The new administration has walked back much of the October 11 memo, prompting local municipalities to take matters into their own hands and legislate. So, it's come full circle.

NRMC: Election cycles make everything more precarious for practical-minded employers to implement and standardize sensible policies. How does one go about writing a handbook given the politics involved?

CM: My advice is to consult with your attorney. The years from 2015-2018 all had major legislation that required revision of employee handbooks. The case of less is more applies. The fewer policies you implement to regulate or discourage cannabis use, the better in most cases. Instead, create a baseline policy for a drug-free and alcohol-free workplace, emphasizing safety, and prioritizing policies that document signs of impairment. As for a specific testing policy: all your locations can conduct reasonable suspicion, "under the influence" testing, and still be in compliance with state and local laws. Explain to staff the organization's legitimate safety concerns, your policy for drug testing, state and local laws, and you have already preempted anti-discriminatory allegations.

NRMC: How should nonprofit employers handle these issues when interviewing volunteers and new hires?

CM: Generally, I advise against having this discussion in a screening process. It's just not helpful. It's ill-advised to bring up marijuana use in interviews with volunteers or new hires for the same reason you should not ask about physical disabilities. Rather, your screening should be a forward-looking statement of essential functions (such as: Can you lift and carry 50 lbs? Can you sit at a desk for multiple hours?) versus a retrospective inquiry as to whether someone has used cannabis in the past. Nonprofit vs. for-profit employers are not terribly different in this respect, except for volunteers. Nonprofits have a little more leeway in terms of mission, belief, and activism. For instance, a healthcare nonprofit may be advocating for medical marijuana, and their policies might reflect a more liberal view. Nonprofits are allowed to take those positions and be more vocal in leading by example.

For many employers, the topic of drug testing is simply a financial decision. In Georgia there is an insurance discount for drug testing. The state legislature created the Drug-Free Workplace Program outlining very specific procedures employers must put in place in exchange for an insurance discount. So, the state government here is actually still encouraging the practice. Similarly, some insurance companies want to force drug testing as a condition of coverage because a positive drug test is a defensible reason to deny a claim. In a workers' compensation claim, a positive drug test allows the insurer to deny the case under the presumption the drug use caused the accident; the injured employee must prove otherwise to be covered.

Now, those same employers are wondering how to reconcile this with legislation banning or limiting marijuana drug testing. My advice, to simplify things, is to start by considering if/why pre-employment drug testing is really necessary to your organization. In most cases, it's not. If it is, consult with an attorney and figure out a way to document the legitimate, non- discriminatory reasons. Likewise, consider modifying your random drug testing policy to be a reasonable suspicion testing policy. And finally, leave your post-accident drug testing policy in place but administer tests every time, and only when drug use could have caused an accident.

Resources:

- “Could marijuana be legal under federal law by the end of 2019?”: https://etfdailynews.com/2019/01/22/could-marijuana-be-legal-under-federal-law-by-the-end-of-2019/
- “New Frontier Data Projects U.S. Legal Cannabis Market to Grow to $25 Billion by 2025”: https://newfrontierdata.com/marijuana-insights/new-frontier-data-projects-u-s-legal-cannabis-market-grow-25-billion-2025/
- “What is Marijuana?” National Institute on Drug Abuse: https://www.drugabuse.gov/publications/drugfacts/marijuana
- “5 Tips to Help Employers Deal With Legal Marijuana Use”: thebalancecareers.com/employers-legal-marijuana-use-1917551
- “Marijuana Legalization Bills Are Advancing In Several States”: www.forbes.com/sites/tomangell/2019/02/27/marijuana-legalization-bills-are-advancing-in-several-states/– 111f62c17a35
- Drug Testing laws by State (note: these continue to evolve rapidly): http://interactive.blr.com/Global/FileLib/Drug_Testing_Seminar/39318_DrugTesting_Report_EHSDA.pdf